Supreme Court, U.S.
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No. 92-104

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JOSEPH F. ADA, GOVERNOR OF GUAM, in his official capacity,

Petitioner,

—v.—

GUAM SOCIETY OF OBSTETRICIANS & GYNECOLOGISTS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the unconstitutionality of Guam Public Law 20-134 ["the Act"], which prohibits all abortions except in cases of ectopic pregnancy or in any pregnancy after implantation if two physicians, who practice independently of each other, "reasonably determine using all available means that there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair [her] health," is a matter of settled law under *Roe v. Wade*, *Doe v. Bolton* and *Planned Parenthood v. Casey*.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page**

Other Authorities:

Respondents Guam Society of Obstetricians & Gynecologists, *et al.*, submit this brief in opposition to the petition for a writ of certiorari filed by petitioner Joseph F. Ada. The petition seeks review of the unanimous decision of the United States Court of Appeals for the Ninth Circuit, issued April 16, 1992, affirming the amended judgment of the United States District Court for the District of Guam entered on October 16, 1990. The opinion of the Court of Appeals is reported at 962 F.2d 1366 (9th Cir. 1992).

COUNTERSTATEMENT OF THE CASE

On July 10, 1989, Senator Elizabeth P. Arriola introduced Bill 848 before the Guam Legislature to challenge *Roe v. Wade*, 410 U.S. 113 (1973), justifying the near complete ban on abortions on the ground that "Guam is a Christian community." *See* 20a.[1] Bill 848 was later amended to include limited exceptions for ectopic pregnancies and pregnancies that endanger a woman's life or pose a substantial risk of grave impairment to her health. The Bill then became known as Substitute Bill 848, which was passed unanimously by the unicameral Legislature on March 8, 1990 after threats of excommunication from the Roman Catholic Archbishop of Guam. On March 19, 1990, petitioner signed the Bill into law as Public Law 20-134, effective immediately, based on his "personal belief" that "a foetus is a human being." *See* 22a.

The Act prohibits all abortions except in two narrow circumstances: (1) in cases of ectopic pregnancy; and (2) in any other pregnancy after implantation if *two* physicians who "practice independently of each other reasonably determine using all available means that there is a

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[1]Citations to the Appendix to the Petition for Certiorari are in the form "__a"; those to the Appendix to this Brief are in the form "A-_."

substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair [her] health." 39a. The Guam ban not only prohibits performing abortions, but also prohibits "procuring" women to obtain abortions, 39a (§ 3); "soliciting" women to obtain abortions, 40a (§ 5); and prohibits the woman herself from soliciting or "submitting to" an abortion. 40a (§ 4). Thus, abortion providers, counselors and women obtaining abortions are criminally liable under the Act.

During the four days before the Act was enjoined, respondent doctors stopped performing abortions and counseling or referring for abortions. A-3-4; A-5-6; A-7. Some women made plans to travel to Manila, Philippines and Hawaii to obtain abortions. A-5-6. Respondent physicians also stopped inserting IUDs or prescribing morning after pills. A-4. Maria Doe, originally a named plaintiff, was scheduled to have an abortion the day after the law went into effect because she believed that medication she had taken during her pregnancy would have harmful effects on her fetus. Doe Decl. ¶¶ 2, 5.[2] Three doctors refused to perform Doe's abortion, informing her that abortion was now illegal on Guam, and that they were prohibited by the Act from telling her where she could obtain a legal abortion. Doe Decl. ¶ 3.[3]

On March 20, 1990, Janet Benshoof, in a public speech at the Guam Press Club, informed the audience that

[2]The two Declarations (Doe Decl., 3/21/90 and Doe Decl. 2d, 6/14/90) of Maria Doe were sealed by the district court. Ten copies of each have been lodged with the Court.

[3]Maria Doe dropped out of the lawsuit because she was fearful of having her identity revealed in a community as small as Guam. Doe Decl. 2d ¶ 2; *see also* 16a n.*.

abortions could be obtained in Hawaii and gave a telephone number there for further information. 23a. She was promptly charged under the Act's criminal solicitation provisions.[4] *Id.* On March 21, 1990, the Attorney General notified the Guam Police Department, Guam Memorial Hospital, and the Department of Public Health and Social Services that "the new law presents difficult and sensitive law enforcement problems," recognizing the potential for arbitrary enforcement of the Act. A-8.

On March 23, 1990, four days after the Act became law, respondents[5] filed a class action suit and motion for temporary restraining order in the United States District Court for the District of Guam.[6] Respondents challenged the Act as unconstitutional both on its face and as it was applied during the four days it was enforced. On the same day, the court granted the restraining order, and defendants later stipulated to extension of the order pending a trial or

[4]These charges were subsequently dismissed, but without prejudice. *Id.*

[5]Respondents are Guam Society of Obstetricians and Gynecologists, licensed physicians who perform abortions during the first and second trimester of pregnancy who represent themselves, their patients and the class of approximately 30,000 child-bearing women on Guam; the Guam Nurses Association, a non-profit organization of registered nurses who provide abortion counseling and services to pregnant women on Guam; the Reverend Milton H. Cole, Jr., an Episcopal priest who believes and preaches that a woman must be counselled on all options available to her regarding pregnancy, including abortion; Laurie Konwith, who is Jewish and whose faith requires that a woman's health take precedence over any fetal interests and that it is the religious duty of a woman to have an abortion under certain circumstances; and physicians Griley, Freeman and Dunlop, all members of the Guam Society.

[6]The district court certified the class on April 4, 1990.

final judgment. The Attorney General of Guam, a defendant, conceded that the Guam ban was unconstitutional, and the other Guam government defendants filed non-oppositions to plaintiffs' motion for summary judgment. However, the Governor argued that *Roe* does not apply to Guam because of its territorial status and that the Guam ban is justified by the territory's "custom" of "Catholicism." A-10. After full briefing on cross-motions for summary judgment, the district court on August 23, 1990 declared the law unconstitutional and issued a permanent injunction against enforcement of the Act. 34a.

In its "Decision and Order" of that date, the District Court held that *Roe v. Wade* applies to Guam, 24a-26a; that the Act violates *Roe* and *Doe v. Bolton*, 410 U.S. 179 (1973), 26a-29a, 28a n.7; that the solicitation provisions of the law (§§ 4, 5) violate the free speech clause of the First Amendment, 28a n.9; and that the Governor is subject to injunctive relief under 42 U.S.C. § 1983 in his official capacity. 29a-32a. The District Court also suggested that the law might violate the Establishment Clause, 20a n.1, and that certain language in the law was impermissibly vague. 28a n.7.

An appeal was taken by the Governor, the only defendant who persisted in defending the Act,[7] to the

[7]The other defendants in the case declined to appeal the lower courts' decisions on the Act's unconstitutionality. They were the Attorney General of Guam; the Director of the Guam Department of Public Health and Social Services; the Administrator of the Guam Memorial Hospital, the only public hospital on Guam that provides abortion services; and the Board of Directors of the Guam Election Commission, which holds public elections, including referenda, on Guam.

United States Court of Appeals, which unanimously affirmed the district court's decision on April 16, 1992.

REASONS FOR DENYING THE WRIT

Petitioner's request for a writ of certiorari should be denied because he has failed to establish any of the factors that weigh in favor of granting the petition. Petitioner alleges no conflict between the United States Court of Appeals for the Ninth Circuit and any other court of appeals, nor a conflict between the Ninth Circuit and this Court. Petitioner's implied claim that this case involves an "important question of federal law which has not been, but should be, settled by this Court," Sup. Ct. R. 10, is simply a request that this Court re-examine *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992). Just two weeks before this petition was filed, this Court settled precisely the question at issue here. Holding that "[r]egardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability," *Casey*, 112 S. Ct. at 2821 (Joint Opinion), this Court reaffirmed that a ban on all abortions, both before and after viability, such as Guam's, is unconstitutional. This Court should reject petitioner's meritless attack on *Casey*.[8]

[8]Supreme Court Rule 42.2 (formerly Rule 49.2) provides in relevant part: "When a petition for a writ of certiorari . . . is frivolous, the Court may award the respondent . . . just damages and single or double costs." Members of this Court have advocated sanctions for frivolous appeals or petitions for writ of certiorari. *See generally Talamini v. Allstate Ins. Co.*, 470 U.S. 1067, 1071 (1985) (denying certiorari) (Stevens, J., concurring) ("if it appears that unmeritorious litigation has been prolonged merely for the purposes of delay, with no legitimate prospect of success, an award of double costs and damages occasioned by the delay may be appropriate."); *id.* at 1073 (opinion of Burger,

(continued...)

Moreover, the Petition is no more than a request for an advisory opinion, which is prohibited by Article III case and controversy requirements. Guam enacted an absolute ban, yet petitioner seeks review of the Act as if it had been written to prohibit abortions only in certain narrow circumstances. Only if and when Guam enacts such a narrow statute should this Court consider granting review. In support of his argument, petitioner relies only on facts not in the record in an attempt to have this Court issue a binding legislative reconstruction of Guam's statute. For all these reasons, the Court should deny the writ.

I. THE GUAM BAN IS UNCONSTITUTIONAL UNDER *ROE V. WADE*, *DOE V. BOLTON* AND *PLANNED PARENTHOOD V. CASEY*.

The Guam Act would prohibit ninety-nine percent of the abortions performed on Guam. This Court has repeatedly rejected the constitutionality of an outright abortion ban such as that contained in the Guam Act. In *Roe v. Wade*, this Court held:

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[8](...continued)
C.J.) ("Judicious use of the sanction of Rule 49.2 in egregious cases . . . should discourage many of the patently meritless applications that are filed here each year."); *Crumpacker v. Indiana Supreme Court Disciplinary Comm'n*, 470 U.S. 1074 (1985) (opinion of Burger, C.J.) ("effort to invoke the Court's jurisdiction on an utterly frivolous claim should subject the attorney who filed the jurisdictional statement to the sanction of Rule 49.2 of this Court."); *see also Southern Railway Co. v. Gadd*, 233 U.S. 572, 581 (1914) (assessing penalty where "the case was carefully and fully considered in both of the courts below" and "the writ of error was prosecuted only for delay"). Where, as here, the delay reflects only a vulgar hope for a change in this Court's composition and the petition demands a breach of this Court's "promise of constancy," *Casey*, 112 S. Ct. at 2815, the case for sanctions appears to be stronger.

> A state criminal abortion statute of the current Texas type, that excepts from criminality only a *life-saving* procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.

410 U.S. at 164. This "essential holding of *Roe v. Wade*" was "retained and once again reaffirmed," *Casey*, 112 S. Ct. at 2804, less than two months ago by this Court in *Casey*:

> It must be stated at the outset and with clarity that *Roe*'s essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. *Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure.*

Id. (emphasis added).

This Court reaffirmed *Roe* after an exceedingly careful review of the source for the "[c]onstitutional protection of the woman's decision to terminate her pregnancy," *Casey*, 112 S. Ct. at 2804, *id.* at 2804-08, and of the doctrine of *stare decisis*. *Id.* at 2808-16. The Court concluded that "[a] decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment

to the rule of law. It is therefore imperative to adhere to the essence of *Roe*'s original decision . . . ." *Id.* at 2816.

Even under the newly articulated undue burden standard, the *Casey* Joint Opinion provides, "[r]egardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." *Id.* at 2821. That the Act is unconstitutional under *Roe*, as reaffirmed in *Casey*, is beyond doubt.[9] As the Ninth Circuit held, "The Guam Act gives not a nod toward *Roe*. With two narrow exceptions, it simply negates the rights and interests of the pregnant woman and forbids her to terminate her pregnancy from the moment of conception. It is difficult to imagine a more direct violation of *Roe*." 11a. Because the Act is unconstitutional as a matter of settled law, and because no clarification of the law is needed or required, the petition should be denied. *See* Sup. Ct. R. 10.[10]

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[9]The Act is also unconstitutional under *Doe v. Bolton*, 410 U.S. 179 (1973), in which the Court held: "Required acquiescence by co-practitioners has no *rational* connection with a patient's needs and unduly infringes on the physician's right to practice." *Id.* at 199. Like the Georgia statute in *Doe*, the Guam law requires the concurrence of a second physician for those pregnancies that might meet the stringent requirement of endangering the woman's life or creating a substantial risk of grave impairment of her health. Under *Doe*, this requirement is not only unconstitutional, but irrational. The Court in *Casey* pointed out that *Doe* is consistent with the undue burden standard. 112 S. Ct. at 2819.

[10]In the first decision to apply *Casey* to a criminal ban on virtually all abortions, the Oklahoma Supreme Court invalidated an initiative petition that would have submitted to the voters of Oklahoma a provision "*criminaliz*[ing] and *absolutely prohibit*[ing] abortions" except in four narrow circumstances: grave impairment of the woman's physical or

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II. PETITIONER'S REQUEST FOR AN ADVISORY OPINION ON HYPOTHETICAL STATUTES VIOLATES ARTICLE III AND MUST BE REJECTED.

Petitioner urges this Court to use this case as a vehicle to advise legislatures about the extent of permissible restrictions on abortion. Specifically, he suggests that the Court rule on the constitutionality of legislation banning abortions for sex-selection and the sale of fetal tissue, and on the restrictions permissible for post-viability abortions, because, he claims, if these hypothetical applications pass muster, a facial challenge to the Act must fail.[11]

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[10](...continued)
mental health; rape; incest; and grave physical or mental defect of the fetus. *In re Initiative Petition No. 349*, No. 76,347, 1992 WL 184028 at *5 (Okla. Aug. 4, 1992) (emphasis in original). The court held that such a ban -- which on its face is less restrictive than the Guam Act -- "does not allow a woman to make a private decision to obtain an abortion at any time during the pregnancy -- either before or after viability. It does not protect a woman's liberty interest as defined by *Casey*." *Id.* Accordingly, the court struck the Initiative from the ballot.

Similarly, attorneys for the state of Utah in *Jane L. v. Bangerter*, No. 91-C-345-G, recently conceded that Utah's criminal statute banning virtually all abortions is unconstitutional under *Casey* ("Utah Code Ann. § 76-7-302(2), to the extent that it prohibits the performance of nontherapeutic abortions prior to twenty weeks gestational age, appears to be unconstitutional."). Letter from Mary Anne Q. Wood to United States District Judge J. Thomas Greene (June 30, 1992), *see* A-2.

[11]Petitioner characterizes this case as a facial challenge and argues that since some of the Act's applications may be valid, the Act should be upheld as facially constitutional. *Casey*, however, not only settled the unconstitutionality of Guam's abortion ban, it also rejected an argument like petitioner's, *viz.*, that a statute may be facially constitutional even if

(continued...)

Petitioner's request that this Court determine all possible circumstances under which abortion may be constitutionally prohibited, absent a statute banning abortion in those particular circumstances, is a request for an advisory opinion, in violation of Article III of the United States Constitution.

None of Petitioner's hypothetical statutes are the law on Guam or at issue in this case. The Act does not mention sex-selection, fetal tissue sales, or even viability. Nor does the legislative history of the Act discuss or consider any of these particular prohibitions. Petitioner invents various statutes and asks the Court to rule on their constitutionality. *See Shaffer v. Heitner*, 433 U.S. 186, 220-221 (1977) (Brennan, J., dissenting) ("a purer example of an advisory opinion is not to be found" than Court's commentary on constitutionality of hypothetical Delaware minimum-contacts law). Both the lack of a statute presenting the issues raised by the petition and the lack of a plaintiff with a real stake in the "controversy" deprives this Court of Article III

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[11](...continued)
the constitutional rights of a small number of affected individuals are infringed: "Legislation is measured for consistency with the Constitution by the impact on those whose conduct it affects. . . . The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." 112 S. Ct. at 2829. Under this analysis, the spousal notice requirement was struck down as unconstitutional *on its face*, even though it *might* have a range of constitutional applications. The critical inquiry is whether "in *a large fraction* of the cases in which [the statute] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Id.* at 2830. Respondents easily satisfy this standard. Moreover, *Casey* was a facial challenge -- the Pennsylvania statute never went into effect -- while respondents' challenge to Guam's statute is both facial and as applied.

jurisdiction to resolve the hypothetical issues raised by petitioner.

"[T]he oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (quoting C. Wright, Federal Courts 34 (1963)). Both constitutional and practical reasons support this Court's refusal to rule on hypothetical or abstract issues. "Federal judicial power is limited to those disputes which confine federal courts to a rule consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." *Id.* at 97. By rendering an opinion on petitioner's hypothetical statutes, the Court would exceed the power assigned to it by the case or controversy requirement of Article III. *Id.* at 96. Moreover, "[s]hould the courts seek to expand their power so as to bring under their jurisdiction ill defined controversies over constitutional issues, they would become the organ of political theories." *United Public Workers of America v. Mitchell*, 330 U.S. 75, 90-91 (1947).

The Governor's request for all possible constitutional applications of the Guam statute does not present this Court with a case or controversy. He asks this Court to review statutes that have not yet been enacted. The Court has rejected similar requests for an advisory opinion in *Environmental Protection Agency v. Brown*, 431 U.S. 99 (1977) (per curiam), where the Court refused to review the constitutionality of regulations before becoming effective even though if enacted the Court acknowledged they would need modifications: "Such an action on our part would amount to the rendering of an advisory opinion . . . For [this Court] to review regulations not yet promulgated, the final form of which has only been hinted at, would be wholly novel." *Id.* at 104. This Court also refused to

review the constitutionality of regulations that had not yet taken effect in *Nixon v. Administrator of General Services*, 433 U.S. 425, 438-39 (1977).

The Governor's request is too abstract, and the effects of his proposed law too speculative, for this court to grant review. A ruling by the Court on the hypothetical statutory provisions created by the Governor would be non-binding and thus tantamount to an advisory opinion. This Court has stated that it "will not write nonbinding limits into a silent state statute." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 770 (1988).

The questions presented by the Governor are also non-justiciable for prudential reasons. Judgments cannot be rendered on such abstract issues without a proper record. "Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an injury for the proper exercise of the judicial function." *Renne v. Geary*, 111 S. Ct. 2331, 2340 (1991) (quoting *Longshoremen's Union v. Boyd*, 347 U.S. 222, 224 (1954)). For example, the Governor suggests that the Court examine a hypothetical prohibition on unnecessary pre-viability abortions and all post-viability abortions. But there is no factual record to aid this Court's determination of the validity of such prohibitions or of what constitutes an "unnecessary" pre-viability abortion. The Governor also suggests that abortions for sex-selection and fetal tissue sales can be constitutionally banned, but there is no evidence that such abortions have even been performed on Guam and no evidence of any Guamanian women seeking to have such abortions. The important interests implicated by the hypothetical questions posed cannot be balanced

absent a concrete, factual record.[12] As the Court recently held:

> The free speech issues argued in the briefs filed here have fundamental and far-reaching import. For that very reason, we cannot decide the case based upon the amorphous and ill-defined factual record presented to us. Rules of justiciability serve to make the judicial process a principled one. Were we to depart from those rules, our disposition of the case would lack the clarity and force which ought to inform the exercise of judicial authority.

Renne, 111 S. Ct. at 2340.[13]

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[12]The Governor himself recognizes the potential for "erroneous result[s] due to the lack of an adequate factual record and the lack of well-developed legal arguments." *Pet.* at 16.

[13]*See also Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them") (citations omitted); *Renne*, 111 S. Ct. at 2339 (1991) ("We possess no factual record of an actual or imminent application of § 6(b) sufficient to present the constitutional issues in 'clean-cut and concrete form'") (quoting *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 584 (1947)); *Ramsey v. United Mine Workers of America*, 401 U.S. 302, 312 (1971) ("We find no reference to this aspect of the case in the opinions in the District Court and the Court of Appeals. We are unsure whether it was presented below and whether, in any event, there is record support for it. Accordingly, we deem it inappropriate to consider it in the first instance"); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 163-64 (1975) ("Thus, not only are we unenlightened on the question whether Advice and Appeals Memoranda, as factual matter, contain information the disclosure of which would offend the purposes of Exemption 7, but we are without a lower court opinion on the legal issue. Under such circumstances, we normally decline to consider a legal claim.") (citations omitted).

The Governor relies solely on newspaper and journal articles not included or presented in the lower courts for the claim that the number of sex-selection and fetal tissue sale abortions are increasing, and that therefore this Court should review the constitutionality of a hypothetical statute banning their performance. *See Pet.* at 9 n.9, 10 n.10. But this Court relies on the record of lower court proceedings for evidence before reaching its decisions. *New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970) ("Both sides point to newspaper articles in support of their arguments. None of this is record evidence, and we do not consider it"); *see also Curtis Publishing Co. v. Butts*, 398 U.S. 130, 144 (1967) (Court refused to rely on "information outside the record concerning the special legal knowledge of particular attorneys" to decide if one of the parties had knowingly waived a defense). Thus, the Governor has no factual basis for his argument.

III. THIS COURT MAY NOT REWRITE THE GUAM STATUTE TO CONFORM IT TO CONSTITUTIONAL REQUIREMENTS.

The lower courts found unconstitutional the statutory provisions that prohibit all abortions except (1) where the pregnancy is ectopic, and (2) where "there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair her health."[14]

[14]Petitioner advances the interpretation, never suggested in any court below, that the Act's exception for "grave impairment of health" applies only to *physical* health, *Pet.* at 13, and suggests that this Court clarify whether the requirement that post-viability abortions necessary to protect the woman's health applies in the case where the woman's *mental* health is threatened. This interpretation is contradictory to petitioner's argument in the lower court that abortions not sought for medical reasons are not "health-related." Further, petitioner's failure to (continued...)

Petitioner, under the guise of proposing circumstances in which the Act might be constitutionally applied, is in effect requesting this Court to issue a limiting construction of the statute; that is, restricting its application to "sex-selection" abortions, and those allegedly induced by a desire to create medically utilizable fetal remains.[15] *See Pet.* at 9-10 & nn.9 & 10. This request is inappropriate because: (1) such a construction would exceed the authority of this, or any, Court; and (2) it is unsupported by any indication of legislative intent.

It is a fundamental tenet of judicial statutory construction that while "a court should strive to interpret a statute in a way that will avoid an unconstitutional construction . . . it is 'not a license for the judiciary to rewrite language enacted by the legislature.'" *Chapman v. United States*, 111 S. Ct. 1919, 1927 (1991) (quoting *United States v. Monsanto*, 491 U.S. 600, 611 (1989)). *See also Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988) ("we will not rewrite a state law to conform it to constitutional requirements"); *Hynes v. Mayor of Oradell*, 425 U.S. 610, 622 (1975) ("we are without power to remedy the defects by giving the ordinance constitutionally precise content"); *Hill v. Wallace*, 259 U.S. 44, 70-71 (1922) ("[severability clause] did not intend the court to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not

[14](...continued)
present evidence as to how "health" should be defined, and his failure to request a limiting construction of the term in the lower courts, preclude this Court from addressing the issue here.

[15]Such a limiting construction of the statute would effectively divide all banned abortions into two categories, those that may constitutionally be prohibited and those that may not, and requires impermissible redrafting of the statute.

contain. This is legislative work beyond the power and function of the court."). Courts should only issue narrowing constructions if the statute is "readily susceptible" to such. *American Booksellers Ass'n*, 484 U.S. at 397.

Here, petitioner would have the court construe an absolute ban on abortions as a ban on only some abortions, and has offered two hypothetical situations in which he contends the ban might be constitutional. It is one thing for a court to refuse to invalidate a law which is constitutional in most of its applications, preferring instead to proscribe those few instances in which it cannot be constitutionally applied. It is quite another to uphold an *un*constitutional law by rewriting it to limit its effect to those rare (if not altogether theoretical) potentially constitutional applications. This latter amounts to exactly the type of judicial statutory reconstruction prohibited by a respect for legislative authority, *United States v. Reese*, 92 U.S. 214, 221 (1875), and, in the case of state or territorial statutes, strong federalism concerns. *Eubanks v. Wilkinson*, 937 F.2d 1118, 1127-28 (6th Cir. 1991).

Any judicial construction of a statute must be supported by a clear expression of the legislature's intent in fashioning the statute. *Communication Workers of America v. Beck*, 487 U.S. 735, 762 (1988); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987); *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984). This is especially true in the case of state law. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985); *Sloan v. Lemon*, 413 U.S. 825, 834 (1973).

Petitioner's proffered interpretation of the Act is wholly unsupported by the legislative history. Nowhere in the Act's history, or in the statute itself, is there any mention

of sex-selection abortions or those induced by a desire to sell fetal parts. The Guam legislature's stated purpose was to ban *all* abortions, and it did not differentiate among the reasons for choosing abortion in a given case, except in very limited exceptions concerning the mother's health or life. By creating a comprehensive and interrelated punitive statutory scheme that would leave no one involved in having or obtaining an abortion unpunished, the legislature made clear its overriding purpose to outlaw abortion completely on Guam. For the Court to construe the Act as requested by petitioner would be to circumvent the Guam legislative process and would undermine the territory's autonomy under our federal system.[16]

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[16]Additionally, petitioner's request for a limiting construction at this point in the proceedings is inappropriate. Both the District Court and the Court of Appeals explicitly construed the statute as a near-complete ban. *See* 2a ("the Territory of Guam enacted a statute . . . outlawing almost all abortions"); 23a ("abortions were effectively banned in the Territory of Guam."). This Court has stated that it will "defer to lower courts on state-law issues unless there is 'plain' error; the view of the lower court is 'clearly wrong;' or the construction is 'clearly erroneous' . . . or 'unreasonable.'" *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500 n.9 (1985) (citations omitted); *see also Casey*, 112 S. Ct. at 2822. Petitioner advances no reason why the Court should not defer to the lower courts' construction of the Act.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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August 17, 1992

APPENDIX

Appendix A*
Letter from Mary Anne Q. Wood

June 30, 1992

The Honorable Thomas J. Greene
United States District Court
350 South Main, #220
Salt Lake City, Utah 84101

Re: Jane L. v. Bangerter No. 91-C-345-G

Dear Judge Greene:

On June 29, 1992, the United States Supreme Court issued its decision in Planned Parenthood of Southeastern Pennsylvania v. Casey, Nos. 91-744, 91-902. A copy of the various opinions of the Justices is attached.

Five Justices in Casey explicitly reaffirmed Roe v. Wade, while at the same time modifying certain aspects of that decision and overruling certain portions of other decisions. The regulations at issue in Casey did not involve a direct prohibition of abortion, but broad dicta in the Joint Opinion of Justices O'Connor, Kennedy and Souter was directed to the constitutionality of state regulatory efforts to prohibit nontherapeutic abortions prior to fetal viability. Under the analysis of that dicta, Utah Code Ann. § 76-7-302(2), to the extent that it prohibits the performance of nontherapeutic abortions prior to twenty weeks gestational age, appears to be unconstitutional.

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*Full copies of all appended documents have been lodged with the Court.

The State of Utah regrets this decision by a bare majority of the United States Supreme Court. The State continues to believe that the proper constitutional analysis is that reflected in the Casey opinions authored by Chief Justice Rehnquist and Justice Scalia for four members of the Court. Furthermore, the current majority approach is splintered and is, in a very real sense, dicta because it was not necessary to the outcome in Casey. Nevertheless, and without foreclosing its options on appeal, the State of Utah will not urge this Court to disregard the guidelines established by the Joint Opinion in Casey.

* * *

[2]

Very truly yours,
/s/MARY ANNE Q. WOOD
Mary Anne Q. Wood

Appendix B
Excerpts from Declaration of John S. Dunlop, M.D.
(May 21, 1990)

JOHN S. DUNLOP, hereby declares under penalty of perjury, as follows:

1. I am one of the plaintiffs in the above-entitled action and I make this declaration in support of plaintiffs' Motion for Summary Judgment and Motion for Permanent Injunction. I have personal knowledge of the facts contained herein.

* * *

3. I am a practicing obstetrician and gynecologist. I am Board certified by the American Board of Obstetrics and Gyneco-[2]logy. I am a member of the Guam Medical Association and the Guam Society of Obstetricians and Gynecologists. I have a private practice with Dr. William Freeman at the Women's Clinic, Suite 211, Second Floor, Paul's Plaza, in Tamuning, Guam.

* * *

[5] 17. During the four days that the law was in effect, a couple of women came into the clinic to ask me about having abortions. I told them they had to wait and see if the law would be challenged I did not perform any abortions at the time. A week before the law went into effect I saw a woman who told me she wanted an abortion. When the law went into effect she came in and I had to tell her I could not perform an abortion for her, that abortions were illegal under the law. I could not tell her were to go to get an abortion. However, soon after Janet Benshoof

was arrested and her speech was published in the newspaper with the address and telephone number of an abortion provider in Honolulu, my partner and I clipped the newspaper article and hung it on our bulletin board for women who came into the clinic. We provided information that our patients needed, even though we were in violation of the solicitation provision of the law.

* * *

[6] 21. Together with my partner, William Freeman, we have approximately 6 to 8 patients for whom we have prescribed IUDs. **[7]** During the four days that the law was in effect, I did not prescribe or dispense IUDs or the "morning after" pill, because I believe that they would be illegal under the law.

* * *

Appendix C
Excerpts from Declaration of William Freeman
(May 22, 1990)

William S. Freeman, hereby declares under penalty of perjury, as follows:

1. I am one of the plaintiffs in the above entitled action and I make this declaration in support of plaintiffs' Motion for Summary Judgment and Motion for Permanent Injunction. I have personal knowledge of the facts contained herein.

* * *

3. I am a practicing obstetrician and gynecologist. I am Board certified by the American Board of Obstetrics and Gynecology and currently hold the American Medical Association physician recognition award. I am a member of the Guam Medical Association and the Guam Society of Obstetricians and Gynecologists. I have a private practice with Dr. John Dunlop at the Women's Clinic, at Suite 211, Second Floor, Paul's Plaza, in Tamuning, Guam. I am also Vice Chairman of the obstetrics and gynecology department at Guam Memorial Hospital (hereinafter **[2]** GMH). My practice involves general obstetrics and gynecology. Most of my work is obstetrics, delivering babies. I also do surgery including hysterectomies and tubal ligations. I also perform first and early second trimester abortions.

* * *

[4] 11. During the four days that Public Law 20-134 was in effect, two women came to my office, I examined them,

and they told me they were going to try to leave the island -- one to Manila, the other to Honolulu -- to obtain abortions. I convinced one of them to stay because I thought that this lawsuit would be enjoined. Fortunately for her, a Temporary Restraining Order was issued and she was able to have an abortion. I do not know what became of the other woman.

* * *

Appendix D
Excerpts from Declaration of Edmund A. Griley, M.D.
(May 21, 1990)

EDMUND A. GRILEY, hereby declares under penalty of perjury, as follows:

1. I am one of the plaintiffs in the above-entitled action. I am President of the Guam Society of Obstetricians and Gynecologists and I am also Chairman of the Department of Obstetrics and Gynecology at the Guam Memorial Hospital. I make this Declaration in support of plaintiffs' Motion for Summary Judgment and Motion for Permanent Injunction. I have personal knowledge of the facts contained herein.

* * *

[10] 21. During the four days the law was in effect many people called the office asking what the law meant. Some women came in seeking abortions. I told everyone that abortions were illegal under the law but I did not advise them where to go to get an abortion for fear of violating the law.

* * *

Appendix E
Deposition of Adolf P. Sgambelluri (May 18, 1990)
Excerpts from Deposition Exhibit 2

[SEAL]

GOVERNMENT OF GUAM
AGANA, GUAM 96910

March 21, 1990

MEMORANDUM (Informational) Ref: AG 90-0300
TO: Chief of Police
FROM: Attorney General
SUBJECT: P.L. 20-134

This office has carefully examined Public Law 20-134 (Bill No. 848 COR) in light of controlling United States Supreme Court decisions, and while we believe the law is unconstitutional, that determination ultimately must be made by the courts. On March 20, this office filed in Superior Court its first criminal complaint under the new law in order to quickly bring the constitutional questions to issue in a judicial forum. Although we will strive for an early resolution of these issues, the court proceedings can be expected to take awhile. In the meantime, we are issuing this memorandum for your information and guidance.

* * *

[4]The cases discussed above, while not exhaustive, will give you an idea of the constitutional tests that P.L. 20-134 faces in the days ahead and why we believe that the new law presents difficult and sensitive law enforcement problems. Notwithstanding the doubtful future of P.L. 20-134, until it is otherwise invalidated by the courts, government agencies, particularly law enforcement agencies

have a duty, we believe, to conduct themselves in a manner that, at least, does not imply that the law can be violated without fear of punishment. On the other hand, we see little reason to commit scarce and costly resources to law enforcement activities while the constitutional viability of the new law remains in doubt. Admittedly, this is a fine and delicate line to be tread. With these considerations in mind, our advice to you at this time, pending resolution of the underlying questions we have raised, is as follows:

1) Refer any questions from members of the public about the law to this office the Attorney General (Main office).

2) Refer any complaints about alleged violations of the law to our Prosecution Division.

3) Make no arrests for alleged violations of the law without express prior approval of the Prosecution Division.

[5]We will be advising you more fully as the situation requires. Please let me know if you need further information or assistance.

/s/ELIZABETH BARRETT-ANDERSON
ELIZABETH BARRETT-ANDERSON

cc: Governor
Speaker, 20th Guam Legislature
Director, Department of Education
Director, Department of Public Health & Social Services
Chief, Guam Fire Department
Administrator, Guam Memorial Hospital

Appendix F
Excerpts from Defendant Ada's Memorandum in Reply to Plaintiffs' Opposition to Motion for Partial Summary Judgment (July 6, 1990)"

* * *

[40] Souder also explains that Catholicism can be considered a custom that justifies the passage of the abortion law to the extent Catholicism has been so integrated into Chamorro culture that to be Catholic and to be Chamorro are one and the same The integration of Catholicism into the Chamorro culture has been such that Catholicism as practiced on Guam has taken on non-religious dimensions. This non-religious dimension evolved from the introduction by the Spanish of Catholicism as means of ensuring social order and unity. For example, it is customary for the Chamorro people to honor the Immaculate Concepcion on December 8th, a territorial holiday. This celebration of a Catholic Feast Day derives its significance from the well-known legend of Santa Maria Kamalen, where fisherman from the village of Males'so (Merizo) found a statue of the Virgin Mary mysteriously floating ashore. Since that time, Chamorro have come to view the Virgin Mary as their protectress. * * *

To the extent Chamorros have embraced Catholicism and to the extent it is accepted that church doctrine prohibits abortion, it is **[41]** accurate to say that Catholicism is a custom that supports the ban on abortions.

* * *

"Footnotes omitted.